(11)

IN THE

Supreme Court of the United States

October Term, 1941

Number 274

MASSMAN CONSTRUCTION COMPANY, Petitioner and Appellee below,

vs.

HARRY W. BASSETT, Deputy Commissioner of the United States Employees' Compensation Commission, Myrtle Boling, Arline Boling, Delores [illegible] and Bonnie Boling Williams, Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

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MASSMAN CONSTRUCTION COMPANY, Petitioner and Appellee below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOR THE EIGHTH CIRCUIT

—o—

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

—o—

YOUR PETITIONER, MASSMAN CONSTRUCTION COMPANY, A MISSOURI CORPORATION, RESPECTFULLY SHOWS THE COURT:—

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The decision of the United States Circuit Court of Appeals for the Eighth Circuit, review of which is here sought, was rendered in the case of Harry W. Bassett, Deputy Commis-

sioner, etc., et al, appellants vs. Massman Construction Company, appellee (Number 11,800 in that court). Said case was a suit by injunction to set aside an award under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, Section 901—950 U. S. C. A.) made by the United States Employees' Compensation Commission.

During 1937 petitioner built a dam for the Federal Government across the Mississippi River from Saverton, Ralls County, Missouri, to a corresponding point in Pike County, Illinois. One Harold Reid Boling was employed by petitioner as a carpenter's helper in said work (R. 42).* On May 27, 1937, said Boling was working on one of the concrete piers of the permanent dam at a point inside of a coffer-dam from which all the waters of the river had been withdrawn. (R. 17, 31, 75.) He was stripping away the wooden forms into which the concrete piers had been poured (R. 37). He cut his hand. Infection set in and some days later he died at a hospital located in Hannibal, Marion County, Missouri (R. 60), from scarlet fever, alleged to be the result of said accidental injury and infection arising therefrom.

Boling's widow and minor children filed a claim under the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A., Sections 901-950) with the United States Employees' Compensation Commission (hereinafter called the commission). On February 25, 1939, respondent Bassett, a deputy of said commission, made an award in favor of the claimants (R. 58-60). Within thirty days thereafter petitioner filed this suit in the District Court for the Northern Division of the Eastern District of Missouri seeking to have the award set aside under Section 921, Title 33, U. S. C. A. (R 4-10). The attack made upon the award was on the following grounds:

[*Footnote: Page numbers herein refer to the printed transcript of the record.]

(1) That the accident did not happen on navigable waters of the United States, but inside a cofferdam from which all waters had been withdrawn, and at a point which had been permanently withdrawn from navigation; (2) that Boling's employment was non-maritime; (3) that the contract of his employer, upon which he was engaged, was not a maritime contract but one made on land, to be performed on land, by employees engaged in non-maritime occupations or pursuits and one of local nature and character; (5) that regulation of the matter involved by the State would work no material prejudice to any characteristic feature of the general maritime law. Hence, it was claimed that the Act by its own terms did not apply to Boling's death (Sec. 903, Title 33, U. S. C. A.) and under the limitations of admiralty power laid down by this court could not constitutionally so apply.

None of the defendants, by answer or otherwise, raised any question concerning the propriety of bringing this suit in the District Court for the Northern Division of the Eastern District of Missouri (R. 10-13). To the bill of complaint filed therein by this petitioner, the defendant Bassett, Commissioner, filed a general answer to the merits. He not only did not deny the jurisdiction of the court on the ground of venue, but he specifically admitted in his answer that sitting as a Commissioner in the case he had found that the accident occurred in the above mentioned division and district. (R. p. 11, par. 2—p. 4, p. 2).

The other defendants joined in the answer filed by Bassett and adopted it as their own (R. p. 13). All parties voluntarily went to trial on the merits in said court.

The District Court found for petitioner and adjudged that the award be set aside (R. 140). His opinion is reported in 30 Fed. Sup. 813. Separate findings of fact and conclusions of law made by the District Judge are set out (R. 135). The

Deputy Commissioner, Bassett, and the claimants appealed to the Circuit Court of Appeals for the Eighth Circuit. That court made no findings on the merits of the case, but reversed the District Court on a ground not raised below. It found: that the accident which caused the infection from which Boling died happened east of the center line of the channel of the Mississippi as it "existed before any construction work in the river, and also at the time of the injury;" (but made no finding as to the location of said line in 1910 when the boundaries of the District were defined Sec. 171, Title 28, U. S. C. A.); that Section 921 *supra* required a suit to review to be brought in the District "in which the injury occurred;" that this requirement "is not merely one of venue, but is jurisdictional;" and that the acts of Congress giving the States of Missouri and Illinois *concurrent* jurisdiction over the river (3 Statutes at Large 545 and 3 Statutes at Large 429) did not apply to Federal Courts sitting within those States.

Petitioner filed a timely motion for rehearing and also by leave of court an additional suggestion in support thereof. By the latter it called attention to the fact that in a death case, such as the case at bar, the word "injury" used in Section 921 of the Act meant injury or death because the term "injury" is so defined by Congress in the Act itself (Section 902, sub-section 2), and that Congress had in the Act provided independent relief and procedure for cases in which death ensues separate from those applicable in cases of injury not causing death. That, therefore, in a death case the place of injury within the meaning of Section 921 was the place at which the death occurred, and not the place at which the accident causing death occurred, and that in this case it was admitted that decedent died at Hannibal, Missouri, within the Northern Division of the Eastern District of that State. The Circuit Court of Appeals denied a rehearing (R. 169).

II

JURISDICTIONAL STATEMENT

Jurisdiction to grant the writ sought is vested in this court under Section 240 of the Judicial Code, as amended by Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

The judgment of the Circuit Court of Appeals was rendered May 2, 1941 (R. 169). The petition for rehearing was overruled June 9, 1941, and on June 19, 1941, the Circuit Court of Appeals made an order granting petitioner a stay for 30 days thereafter for the purpose of filing this petition (R. 171). This petition is filed within 90 days after the original judgment of the Circuit Court of Appeals and hence less than 90 days after the overruling of the petition for new rehearing.

III

QUESTIONS PRESENTED AND REASONS RELIED ON FOR GRANTING WRIT

A. **Questions presented.** The decision which we ask this court to review raises three questions which are here involved:

(1) Is the requirement of Section 921, Title 33, that a suit to set aside a compensation award be brought *in the District where the "injury" occurred* a mere *venue* provision, which can be waived by the parties, or a *jurisdictional* provi- which cannot be waived?

(2) In a death case is the place where the injury occurred as used in Section 921 the place of *death* or the place where the *accident* causing death happened?

(3) Does the United States District Court for the Eastern District of Missouri sitting in admiralty have jurisdiction over the entire Mississippi River concurrent with the District Courts of the United States in Illinois?

(B) **Specific grounds:** Petitioner asks this court to assume jurisdiction, and to grant its writ herein for the following reasons:

(1) The Circuit Court of Appeals, in holding that the above mentioned requirement of Section 921 was not a venue requirement, but was one relating to jurisdiction which the parties could not waive, decided a particular question of Federal law which has not been heretofore directly decided by this court, but which because of its importance should be decided and settled. Said decision of the Circuit Court of Appeals, however, is in principle in conflict with the basic proposition of law in relation to jurisdiction and venue laid down in the prior controlling decisions of this court.

(2) That the interpretation of the words "district in which the injury occurred" contained in Section 921, Title 33, U. S. C. A., as applying to cases where benefits for death are claimed and in view of the definition of "injury" as including death contained in Section 902 (2) presents a vitally important question of Federal law which has not been, but should be, settled by this court. It is this: Since Section 902 (2) defines "injury" as meaning "accidental injury or death" "when used in this act," are we to understand the word "injury" in Section 921 (b) as being equivalent to death so that the latter section would authorize the bringing of a suit to review an award for death benefits in the district where the death occurred? The decision of this is necessarily involved in the judgment below especially if the view be taken that Section 921 is jurisdictional in nature.

(3) In deciding that the District Court in Missouri did not have concurrent jurisdiction with the District Court in Illinois over the whole Mississippi River the Circuit Court of Appeals passed upon an important question of Federal law not heretofore decided by this court, and which should

be settled by Your Honor's decision. The decision of the Circuit Court of Appeals on that point was based upon interpretation of a State statute in regard to the boundary of Ralls County, Missouri (R. S. Mo. 1939, Section 13583, set out in the appendix) and is probably in conflict with applicable local decisions, to-wit: the cases of *State* v. *Kurtz*, 317 Mo. 380, 295 S. W. 747; *Sanders* v. *Anchor Line*, 97 Mo. 261; *Swearingen* v. *The Steamboat Lynx*, 13 Mo. 519.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit and commanding said court to certify and send up to this court on a day designated a full and complete transcript of the record and all proceedings in this cause to the end that this cause may be reviewed and determined by this court as provided for in the statutes of the United States in such cases made and provided, and that the judgment of the said Circuit Court of Appeals be reversed and its opinion quashed, and the judgment of the District Court of the United States for the Northern Division of the Eastern District of Missouri be affirmed and reinstated, and for such other relief as in the premises to this Honorable Court may seem meet and proper, and so your petitioner will ever pray.

THE MASSMAN CONSTRUCTION CO.
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Its Attorney of Record.

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—o—

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion of the United States Circuit Court of Appeals in this case has not been published and hence cannot be cited. It is set out in the transcript, pages 160 to 166. The opinion of the United States District Court is reported in 30 Federal Supplement 816.

II

JURISDICTION

The grounds on which the jurisdiction of this court are invoked are set out separately in the form required by this court's rule in the petition for certiorari, page 5, *supra*. For brevity they will not be repeated here.

III

STATEMENT OF FACTS

The facts are stated in sufficient detail in the petition, page 1, *supra*. For brevity a further statement here is omitted.

IV

SPECIFICATION OF ERRORS

1. The learned Circuit Court of Appeals erred in reversing the judgment and decree of the District Court on the ground that the said District Court was without jurisdiction.

2. The learned court below erred in holding that the requirement of Section 921 (b), Title 33, U. S. C. A., that suits brought thereunder "be instituted in the Federal District Court for the judicial district in which the injury occurred" was "not merely one of venue but . . . jurisdictional" (R. 164).

(3) The learned court below erred in holding that an objection based on the alleged institution of the suit in the wrong district was not waived by the failure of defendants to assert such objection by proper motion or answer in the trial court.

(4) The learned court below erred in holding that this case was brought in the wrong district (R. 160-161), it having been brought in the district where decedent died, but, as the appellate court found, not in the district where the accident which caused the death occurred.

(5) The learned Court of Appeals erred in holding that the District Court for the Eastern District of Missouri did not have jurisdiction concurrent with the federal district courts in Illinois over the entire Mississippi River.

(6) The learned court below erred in the construction of the State statute defining the boundaries of Ralls County,

Missouri (Sec. 13583, R. S. Mo. 1939) in that it failed to construe said section in the light of the act of admission (3 U. S. Stat. at Large 545) and the Constitution of Missouri (Art. I, Sec. 1).

(7) The learned court below erred in deciding the last mentioned question of State law in a manner not in accord with the applicable local decisions hereafter cited.

V

SUMMARY OF ARGUMENT

A

The Circuit Court of Appeals erroneously decided that the requirements of Section 921, Title 33, U. S. C. A., about the place of bringing a suit thereunder created conditions precedent to the trial court's subject-matter jurisdiction and that they were not mere venue requirements and hence could not be waived by the defendants. This construction of Section 921 raises an important question of Federal law not heretofore directly decided by this court but which ought to be settled by its decision. The decision below is, however, as to its basic premises in conflict with general rules of law laid down in prior controlling decisions of this court under different but analogous statutes and with decisions in other circuits under such analogous statutes.

B

The learned Circuit Court of Appeals erred in holding that under Section 921, *supra*, a suit to review a compensation award in a death case must be brought in the district where the accident causing death occurred. Section 921, read in the light of Section 902 (2), permits the bringing of such a suit in the district where the death occurred.

C

The learned Circuit Court of Appeals erroneously held that the place of the present accident (even though it were located east of the thalwig of the Mississippi) was outside the territorial jurisdiction of the District Court in Missouri, since that court had jurisdiction over the entire river concurrent with that of the distict courts in Illinois.

VI

ARGUMENT

A

Is the requirement of Section 921 (b), Title 33, in regard to the place of instituting suits thereunder, a venue requirement which may be waived by the parties or a requirement as to subject-matter jurisdiction which cannot be waived by them? The learned court below decided that it was the latter. In so doing it passed upon an important question of Federal law which has not been heretofore decided by this court but which should be settled by a decision of Your Honors. The importance of the question lies in the fact that a large number of cases under the Longshoremen's Act will be governed by the rule adopted in this connection.

While this court has not heretofore construed the section here involved, it has construed a number of other statutes, the language of which is similar to that used in Section 921 *supra*, and in so doing has laid down general principles of law with which we believe the present decision below conflicts.

The portion of Section 921 (b), with which we are here concerned, reads as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought

> by any party in interest against the deputy commissioner making the order, *and instituted in the Federal District Court for the judicial district in which the injury occurred.*" (Our italics.)

In holding that this requirement "is not merely one of venue but is jurisdictional," the court below cited no authority to sustain its position. In fact, the question has never heretofore been decided by a circuit court of appeals or by this court. The following decisions, under analogous statutes, are, we believe, controlling:

(1) Section 109, Title 28, U. S. C. A., regulates the place of bringing patent suits. The language of that provision is far stronger than that of Section 921, Title 33:

> "The District Courts shall have jurisdiction . . . in the districts, etc."

Yet this court has expressly held that the requirement of Section 109, Title 28, is one of venue only and that it may be waived by the entrance of a general appearance. *General Electric Company* v. *Marvel Rare Metals Company*, 287 U. S. 430. An attempt may be made to distinguish this case from the case at bar by saying that Federal district courts as a class are given jurisdiction in patent suits under Section 41 of Title 28, and that the provisions of Section 109 of that title cannot therefore be taken as a grant of jurisdiction and so must relate to venue only. But Section 41 of Title 28 also gives to district courts, as a class, jurisdiction over cases arising under the constitution and laws of the United States and involving more than three thousand dollars. The present case and cases like it arise under the constitution and law of the Federal government and this case involves in excess of three thousand dollars. Had Section 921 of Title 33 not been enacted the Federal courts would certainly have had jurisdiction to enjoin or prohibit an attempted action of the Em-

ployees' Compensation Commission which was beyond the powers of said body as defined in the act creating it.

(2) Similar language is contained in Section 10 of Title 6, U. S. C. A., with respect to actions brought against surety companies on bonds required by Federal law. While this section has not been construed by this court, it has been interpreted in other Federal circuits as a requirement of venue and not a jurisdictional one. *United States ex rel Phoenix Iron Company* v. *California Bridge Company*, 152 Fed. 559.

(3) Perhaps a stronger analogy is found in the decisions under the *Jones Act*, in particular Section 688 of Title 46. Both the Jones Act and the Longshoremen's Act were enacted in the exercise of Federal admiralty power and both created new rights not theretofore existing under the general law of the sea and provided specific remedies for the enforcements of those rights. Section 688, *supra*, provides:

> "Jurisdiction in such actions shall be under the court of the district where the defendant employer resides."

Note that this is a part of the section which creates the right and defines the remedy. But this court has expressly held that the requirement therein as to the place of bringing suit is one of venue only and may be waived by a general appearance of the defendant. *Panama Railroad Company* v. *Johnson*, 264 U. S. 375.

(4) The language of the Anti-Trust Act (Sec. 22, Title 15) is somewhat different but presents an analogy to the present situation. Its requirement that suits brought thereunder be instituted in a certain district has been expressly held by this court to create a venue requirement only. *General Investment Company* v. *Lake Shore Railway Company*, 260 U. S. 261.

(5) The provisions of the Tucker Act, now contained

in Sub-Section 20, Section 41, Title 28, originally required that suits against the United States, brought thereunder, be commenced "in the district where the plaintiff resides" (24 Statutes at Large 506). But it was expressly held by this court in *United States* v. *Hvoslef*, 237 U. S. 1, that this requirement could be waived by a failure of timely objection on the part of the government.

(6) The general principles governing the distinction between requirements having to do with subject-matter jurisdiction which cannot be waived and those having to do with venue which can be waived have been often announced by this court and by the lower Federal courts as well as by those of the several states. These decisions are well summarized in Section 501, Elliott on *Appellate Procedure*, as follows:

> "This is the key to the situation. The principle that there is jurisdiction of a class and also jurisdiction of a particular subject matter is a reasonable one and is recognized in logical treatises. An objection that there is no jurisdiction of the subject—that is, of the general class—reaches the competency of the court and may be made at any time, since, if the court is not competent to entertain authority over the class, it is, as to that class, as if there were no court. As an illustration of a case where a court is incompetent because of want of authority may be taken the instance of a justice of the peace assuming to exercise jurisdiction in a case of purely equitable cognizance. In such a case it is proper to hold that the question of jurisdiction may be made in the first instance in the appellate tribunal. As a case illustrating the rule that where there is general authority over the subject no objection of a jurisdictional character, not in some mode presented to the trial court, may be taken, is that of a party liable to an action in the county where the wrong was committed voluntarily and without objection submitting it to a trial in a different county."

The above language is quoted with approval in the case of

Albuquerque etc. Coal Company v. *Lermuseaux* (Sup. Ct. of New Mexico), 187 Pac. 560, l. c. 562. Where, for example, a case is one in admiralty, of which the district courts in general have jurisdiction it is held that an objection based upon the fact that the case is brought in the wrong district must be made at the first opportunity or else forever waived. *St. Paul etc. Insurance Co.* v. *the Lake Superior*, 21 Fed. Cases, No. 12,240; *The Wilamette*, 70 Fed. 874; *Kauglig* v. *United States*, 19 Fed. (2d) 74. So also cases which, because of diversity of citizenship or because a federal law is involved, fall within the general class of which district courts as a class exercise jurisdiction may be tried in any district court if the parties thereto consent, and a failure to object on the ground that the case is brought in the wrong district is a waiver of such objection. *McCormick Co.* v. *Walthers*, 134 U. S. 41; *Commercial Insurance Co.* v. *Consolidated Trust Co.*, 278 U. S. 177; *In re Moore*, 209 U. S. 490; *Thames and Mercey Insurance Co.* v. *United States*, 237 U. S. 19; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Martin* v. *B. & O. R.*, 151 U. S. 673. Two decisions of the Circuit Court of Appeals for the Eighth Circuit are, in this connection, of great importance, since they lay down principles directly at variance with the decision of that court in this case. They are *United States* v. *Edwards*, 73 Fed. (2d) 477, l. c. 479 and *United States* v. *Kiles*, 70 Fed. (2d) 880, l. c. 881. Those cases were suits upon policies of war risk insurance. Plaintiff's petition in each instance failed to state that any disagreement had been had between the beneficiary and the government. The Court of Appeals held that the presence of such disagreement was jurisdictional, but that it went solely to jurisdiction over the subject-matter of the particular case and not to jurisdiction over the subject-matter of the class of cases to which it belonged, and hence was waived by the government's failure to object in the trial court to the fact that plaintiff had not shown it.

It is submitted that because the present class of cases arises under the constitution and laws of the United States and because of the general language of Section 921 (b), district courts in general are given jurisdiction over the class of such cases, and hence an objection to the jurisdiction of the court over a particular case, based upon the fact that it is brought in the wrong district, is waived by the failure of the defendants to assert it in the district court.

We have not found any case in this court or in the lower federal courts where a direction contained in a statute that cases be brought in a certain district has been held to relate to subject-matter jurisdiction. All such statutory directions have been held to relate to venue only. Seeming exceptions to the rule found in land title cases and criminal cases are based upon historical reasons growing out of the original function of the jury as a group of witnesses and set these cases aside from those of a transitory nature. The requirement that a transitory case be brought in a certain county or district has been universally held to be subject to waiver. Workmen's Compensation proceedings and court suits to review compensation awards are universally held to be transitory. *Chambers* v. *Sanford & Treadway*, (Tenn. Sup.) 289 S. W. 533; *Ocean Accident & Guaranty Co.* v. *Martin*, (Ga. App.), 134 S. E. 174; *Albuquerque etc. Coal Co.* v. *Lermuseaux*, (New Mexico Supreme) 187 Pac. 560; *Industrial Commission* v. *Murphy*, 41 Oh. App. 206, 180 N. E. 731.

The last two cited cases are particularly important because they involve states of fact identical with those in the case at bar and were brought under Workmen's Compensation statutes, the wording of which is very similar to Section 921. In both cases the state courts decided that the venue requirement could be and were waived. The Albuquerque case is largely based on Federal authorities. The following quotations are typical:

Motoshaver, Inc. v. Schick Dry Shaver Co. (CCA 9th Ct.) 100 Fed. (2d) 236, 237, "Every court has jurisdiction of the subject matter of patent infringement, and, if the defendant appear generally the court has the power to adjudicate the charges against him."

Industrial Commission v. Murphy, *supra*, "all courts of common pleas have jurisdiction to review on appeals the awards of the Industrial Commission. The venue of a particular appeal is the county in which the injury occurred. The Industrial Commission made no timely objection to the trial of the case in the county of Athens, rather than in Hocking County, and by pleading to the merits of the case waived its right to subsequently raise that question."

B

Meaning of the term "injury" in Section 921.

The Court of Appeals decided that the accident which brought about Boling's death occurred east of the thalwig of the Mississippi River as it "existed both before any construction work on the river and also at the time of injury." The Court did not decide where the river channel was in 1910 at the time the boundaries of the Eastern District of Missouri were established by statute, and indeed there was no evidence from which such a finding could be made. But, assuming that the accident did happen east of the center line of the channel, we are brought to the consideration of the next premise in the Court of Appeals' argument, to-wit: that the place of injury mentioned in Section 921 is in all cases the place of the accident. This proposition ignores the statutory definition of the word "injury" contained in Section 902 (2) of the Act. The construction of these two sections together presents a question of Federal law not heretofore decided by this Court, but which should be so decided. The Court will note that the point here made was not raised in the original motion for rehearing but was raised in certain additional suggestions in support thereof filed by this petitioner with leave

of the Court of Appeals. Section 902, Title 33, U. S. C. A., reads as follows:

> "When used in this Act the term 'injury' means accidental injury *or death* arising out of and in the course of employment." (our italics)

An examination of the Congressional Record discloses that as this bill was originally introduced and as it passed the senate the words "or death" were not included in the definition (S. B. 3170, 67 Congr. Rec. 10,608, June 3, 1926). The bill was re-written by the House Judiciary Committee, and as so re-written passed the House (68 Congr. Rec. 5404), and at that time the words "or death" were inserted in the definition. It is thus clear that these words were placed in the definition not through inadvertence but with deliberate intent. This Court has said that where a legislative body in passing an act expressly defines a term as used therein, the courts will be bound to accept the definition so given. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, l. c. 96. See also *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 Fed. (2d) 166; *In re Kohler*, 79 Cal. 313, 21 Pac. 758.

It is submitted, therefore, that in the light of the mandatory definition contained in Section 902, the word "injury" used in Section 921 (b) must be read "injury or death."

This construction is borne out by the fact that the cause of action granted to the dependents of the deceased employee is separate and distinct from the cause of action which the employee might have had had he lived and that the operative fact creating their right of action is the death of the employee. *International Mercantile Marine Co. v. Lowe*, 93 Fed. (2d) 663; *Norton* v. *Traveler's Insurance Co.* (C. C. A. 3rd) 105 Fed. (2d) 122, 123, 124. In this connection note the care with which Congress has distinguished the two causes of action, particularly in Section 913 of the act.

C

CONCURRENT JURISDICTION

The Court of Appeals correctly held that the boundaries of the territorial jurisdiction of the Eastern District of Missouri are in the first instance governed by Federal law (R. 165). Section 171 of Title 28 U. S. C. A. defines the boundaries of this district as including "the territory embraced on the date last mentioned (July 1, 1910) in the counties of ...Ralls...." We must, however, look to the state statutes of Missouri to find what territory was embraced in the county of Ralls on July 1, 1910. The applicable statute is that cited by the Circuit Court of Appeals, to-wit: Section 13, 583 R. S. Mo. 1939 (Sec. 11, 924, R. S. Mo. 1929). It is true that this act defines the eastern boundary of Ralls County as the "middle of the main channel" of the Mississippi River. However, this statute must be red in connection with the constitution of the state as it existed when the statute was enacted and still exists. When the states of Missouri and Illinois were admitted to the union Congress provided in the two enabling acts that they should have concurrent jurisdiction over the entire Mississippi River. (3 Stat. at Large, 429, 3 Stat. at Large 545). Acting under this congressional grant of authority our first constitutional convention inserted similar words in the Constitution of 1820 (Art. 10, Sec. 2). This provision was carried forward in the Constitution of 1865 (Art. 11, Sec. 2) and in the present Constitution of 1875 (Art. 1, Sec. 1). Section 13,583 R. S. Mo. 1939 (Sec. 11924 R. S. Mo. 1929) must therefore be read in connection with the constitution and when Congress said that the territory embraced in the County of Ralls should be placed in the Eastern District of Missouri, it included all of the applicable state laws defining the boundaries of that county, the constitution as well as the statute, and therefore it included the provision that the county as a political subdivision of the State should have concurrent jurisdiction

over the entire river. Such is the interpretation of the law of this State laid down in the decisions of its highest court. *State* v. *Kurtz*, 317 Mo. 380, 295 S. W. 747; *Sanders* v. *Anchor Line*, 97 Mo. 26; *Swearingen* v. *Steamboat Lynx*, 13 Mo. 519.

It is submitted that the question of whether or not the Federal District Courts in this State have jurisdiction over the entire Mississippi River concurrent with the District Courts in Illinois is of vital general importance and should be decided by this court. Should not the Federal District Court within which Ralls County, Missouri is situated have and exercise the same territorial jurisdiction as that exercised by the Ralls County State Circuit Court? The Mississippi River is quite unlike other rivers in this country in that the boundaries of its channel are constantly changing.* To determine exactly where the center line was on July 1, 1910, is an absolute impossibility. Unless the concurrent jurisdiction provision be applied, it will be almost impossible for the Federal Courts, sitting in admiralty, to determine whether or not any maritime accident happened in the Eastern District of Missouri or in Illinois. Practical considerations should therefore weight strongly in favor of the construction for which we here contend.

D

As the decision of the Circuit Court of Appeals was based solely upon the jurisdictional questions involved we have for brevity not briefed the merits of the case. This Court will, no doubt, be concerned somewhat with the matter of the merits. While not at this time briefing the question thus raised at length, we deem it sufficient to refer to the excellent opinion

---

* Footnote. This geographical fact may be judicially noticed by the Court: *Radford* v. *Wood*, 83 Neb. 775, 120 N. W. 58; *Drainage Dist.* v. *Exchange Trust Co.*, 175 Ark. 939; *McCall* v. *North Pine Bluff Realty Co.* (Ark.) 185 S. W. 1178.

written by Judge Charles B. Davis in the District Court and cited above. (30 Fed. Sup. 816).

E

CONCLUSION

For the reasons stated above we believe that the present case presents certain novel and highly important questions of federal law and that the general public interest demands that these questions be set at rest by a final word spoken by this Court.

Respectfully submitted,

BEN ELY,
Attorney for Petitioner.

APPENDIX

For convenience of the court and in accordance with the rules thereof the following statutes are copied for ready reference:

Sec. 902, Title 33, U. S. C. A.

"Sec. 902. Definitions. When used in the (act) chapter—

(1) ....

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

Sec. 921, Title 33, U. S. C. A.

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States."

Sec. 171, Title 28, U. S. C. A. Sec. 91 Judicial Code as amended. (The present portions went into effect as of June 1, of 1910.):

"The State of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri.

The eastern district shall include the territory embraced on the 1st day of July, 1910, in the city of Saint Louis and the counties of . . . . Ralls. . . ."

Sec. 13583 R. S. Mo. 1939:

Ralls County—

"Beginning at a point in the middle of the main channel of the Mississippi River, where the prolongation east of the line between townships fifty-six and fifty-seven would intersect the same; thence west with said line to the northwest corner of section five, township fifty-six, range seven, west; thence south with the subdivisional lines to the southwest corner of section thirty-two, township fifty-three, range seven, west; thence east with the township line between townships fifty-two and fifty-three to the line of Pike County; thence in a direct line to the southeast corner of section sixteen, township fifty-four, range five, west; thence in a direct line to a point on the Mississippi River, where the line between townships fifty-two (fifty-five) and fifty-three (fifty-six) strikes the same; thence east to the middle of the main channel of the Mississippi River; thence up said river in the middle of the main channel, to the place of beginning."

Sec. 12004 R. S. Mo. 1929:

"All other portions of territory within the state shall remain attached, for civil and military purposes, as now provided by law."

3 U. S. Statutes at Large 545 (Act of Admission of Missouri):

Sec. 2. . . . . Provided . . . That the said State shall have concurrent jurisdiction on the river Mississippi and every other river bordering on the said State, so far as the said rivers shall form a common boundary to the said State and any

other State or States, now or hereafter to be formed and bounded by the same—such rivers to be common to both; and that the river Mississippi and the navigable rivers and waters leading to the same shall be common highways and forever free, as well to the inhabitants of said State as to other citizens of the United States, without any tax, duty, impost or toll therefor imposed by the said State."

Missouri Constitution of 1875, Sec. 1, Art. I. (The identical provision appeared in previous constitutions from the first.):

"... The State shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the State, so far as the said rivers shall form a common boundary to the State and any other State or States...."

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 274

MASSMAN CONSTRUCTION COMPANY, PETITIONER

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER FOR THE TENTH DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION; MYRTLE BOLING; ARLINE BOLING; DELORES BOLING AND BONNIE BOLING WILLIAMS, NEE BONNIE BOLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BASSETT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 30 F. Supp. 813. The opinion of the Court of Appeals (R. 160–166) is not yet reported.

JURISDICTION

The decree of the United States Court of Appeals for the Eighth Circuit was entered May 2, 1941 (R. 167). The petition for a writ of certiorari was filed July 14, 1941. The jurisdiction

of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the territory east of the main channel of the Mississippi River bordering Ralls County, Missouri, is included within the judicial district of the United States District Court for the Eastern District of Missouri.

2. Whether for purposes of bringing injunction proceedings under section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921 (b)) the place of injury in death cases includes both the place of death and the place of the injury resulting in the death.

3. Whether the requirement of section 21 (b) of the Act (33 U. S. C. 921 (b)) that injunction proceedings to set aside a compensation award be instituted in the judicial district in which the injury occurred may be waived.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, pp. 10–11.

STATEMENT

The petitioner, a Missouri corporation (R. 4–5), constructed a dam across the Mississippi River from Salverton, Ralls County, Missouri, to a point in Illinois (R. 17, 41–42, 118). Harold Boling was employed by petitioner (R. 42–44, 68, 69–70, 125–

126) as a carpenter's helper in the construction of the project (R. 37, 68, 73, 102). While so employed (R. 37–38, 68–69, 74) Boling cut his hand and wrist (R. 68, 74, 106). The accident occurred at a point in the river east of the main channel (R. 161). An infection set in and Boling died shortly thereafter in a hospital in Hannibal, Missouri (R. 60, 89–90, 98), within the territorial limits of the Eastern District of Missouri. Compensation was awarded the decedent's widow and minor children under the Longshoremen's and Harbor Workers' Compensation Act.

A bill to enjoin the award was filed by petitioner in the United States District Court for the Eastern District of Missouri (R. 4–10). The Eastern District of Missouri is defined to include the territory embraced in Ralls County, Missouri, as of July 1910 (28 U. S. C. 171), and the applicable state statute fixes the eastern boundary of Ralls County at the "middle of the main channel" of the Mississippi River.

Answers were filed by the various defendants denying the principal allegations of the complaint (R. 10–14). The right to maintain the action in the Eastern District of Missouri was not challenged.

The District Court enjoined the award on the ground that the terms of the Longshoremen's Act did not apply to the accident and injury and that the award was for that reason rendered without

jurisdiction (R. 135–140). On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed and directed that the action be dismissed for want of jurisdiction of the District Court. The court held that the injury occurred east of the main channel, beyond the territorial limits of the Eastern District of Missouri, and that the requirement of section 21 (b) of the Longshoremen's Act that proceedings to enjoin an award must be instituted in the district where the injury occurred was jurisdictional and could not be waived (R. 160–166).

ARGUMENT

1. The petitioner's contention that the United States District Court for the Eastern District of Missouri has concurrent jurisdiction with the district courts of Illinois over the entire Mississippi River adjoining Ralls County is without substance. Section 91 of the Judicial Code, as amended (28 U. S. C. 171), as far as material here, limits the eastern district of Missouri to the "territory" embraced in Ralls County, and the Missouri statute describing the boundaries of Ralls County (R. S. Mo., 1929, sec. 11924) fixes the eastern boundary of that county as "the middle of the main channel of the Mississippi River."[1] It is immaterial that the enabling acts for Missouri and Illinois provided for the exercise of concurrent

[1] The finding of the court below (R. 161) that the accident occurred on the Illinois side, east of the main channel, is not challenged.

jurisdiction over the Mississippi by the two states and that a similar provision has been inserted in each of the successive constitutions of Missouri. The territorial limits of the Eastern District of Missouri are governed by the provisions of section 91 of the Judicial Code, as amended, which deal with the physical "territory" embraced in Ralls County, and not with the political or judicial jurisdiction which the county may exercise as a subdivision of the State of Missouri.[2] Cf. *Devoe Manufacturing Co.* v. *United States,* 108 U. S. 401; *United States* v. *Texas,* 162 U. S. 1, 67, 68; *Hyde* v. *Victoria Land Co.,* 125 Fed. 970 (C. C. E. D. Wis.). Where Congress has intended the courts of two districts to exercise concurrent jurisdiction over a river bordering both districts it has expressly so provided.[3]

2. Petitioner contends (Pet. 9, 17–18) that the requirement of section 21 (b) of the Act that the proceedings for enjoining an award be instituted in the "district in which the injury occurred"

---

[2] The enabling act for Missouri makes separate provision for the territorial boundary of Missouri, which is limited to the "middle of the main channel" of the Mississippi River, and the "Jurisdiction" of the sovereign state, which extends to the entire river concurrent with other states bordering on the river. See 3 Stat. 545–546.

[3] Thus section 97 of the Judicial Code, as amended, provides that the "district courts of the southern and eastern districts [of New York] shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; * * *."

should be construed in the light of section 2 (2) which defines injury as "accidental injury or death arising out of and in the course of employment * * * ", and that since the death occurred within the territorial limits of the Eastern District of Missouri, the action was instituted in the proper district. This contention is without substance.[4] The principal purpose of section 2 (2) was evidently to limit the type of compensable injury or death. The provision was certainly not included for the purpose of defining "injury" as "injury or death" where that construction was not otherwise indicated by the context, since in subsequent sections the term "injury or death" is frequently used (see sections 5, 12, 14, 30, 39) and the words "injury" and "death" are often used in different senses. Cf. *International Mercantile Marine Co.* v. *Lowe,* 93 F. (2d) 663 (C. C. A. 2), certiorari denied, 304 U. S. 565; *Associated General Contractors* v. *Cardillo,* 106 F. (2d) 327 (App. D. C.); see sections 3, 13, 19, 44. Whether "injury" includes "death" must therefore depend on the context. And to construe "injury" to mean "injury or death" in section 21 (b) would lead to the unfortunate result of permitting the person bringing suit to choose the district in which

[4] The contention was raised by the petitioner for the first time as an "additional suggestion," by leave of the court below, in support of its motion for rehearing (Pet. 4). It was not raised in the motion for rehearing itself (R. 167–169).

to bring the action without regard to considerations of orderly procedure or the convenience of the defendants. This is a sufficient ground for rejecting the suggested construction.[5] Cf. *Sorrells* v. *United States*, 287 U. S. 435, 446; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394.

3. Petitioner also contends that the requirement of section 21 (b) as to the place of suit is one of venue only, and that it was waived by respondent Bassett and the other defendants by failure to make timely objection. The decision of the court below rejecting this contention is in accord with the only other case dealing with the issue (*American Mutual Liability Insurance Co.* v. *Lowe* (S. D. N. Y.), decided August 21, 1935, and not officially reported) and seems to be correct.[6] Subdivision (d) of the same section, expressly providing that proceedings to enforce or enjoin an award "shall not be instituted otherwise than as provided in this section * * *," is persuasive that a limitation of power was intended, and other requirements of the section concerning the time for instituting the action and the nature of the relief

[5] The question has never been presented in any other case under the Act, and thus has given no difficulty in administration of the Act.

[6] None of the cases cited by petitioner in support of its contentions on this issue arose under the Longshoremen's and Harbor Workers' Act, and, of course, in none was there present an express prohibition, comparable to section 21 (d), against proceeding otherwise than as provided.

which may be granted have been held jurisdictional. *Mille* v. *McManigal,* 69 F. (2d) 644 (C. C. A. 2); *Pillsbury* v. *Alaska Packers 'Ass'n,* 85 F. (2d) 758 (C. C. A. 9), reversed on other grounds, 301 U. S. 174; *Associated Indemnity Corp.* v. *Marshall,* 71 F. (2d) 235 (C. C. A. 9); *id.* 71 F. (2d) 420 (C. C. A. 9); *Swofford* v. *International Mercantile Marine Co.,* 113 F. (2d) 179 (App. D. C.). Further, even if the limitation regarding the place of suit be deemed a provision for the benefit of the litigants and not strictly jurisdictional, the absolute prohibition against the institution of suit in any other manner plainly indicates an intention that the limitation could not be waived and should be strictly enforced regardless of whether timely objections were made by the defendants. Cf. *Kalb* v. *Feuerstein,* 308 U. S. 433, 441–444. It was therefore the duty of the court below to enforce the requirement on its own motion.

The question is not one of importance. So far as we are aware the *American Mutual Liability Insurance Co.* case is the only other instance in which the issue has arisen. It has been the consistent practice to institute proceedings in the district in which the injury resulting in disability or in death occurred and the failure to do so here was apparently due to the unusual circumstances of this case.

CONCLUSION

It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
Head Attorney.
WALTER S. SURREY,
Attorney.

AUGUST 1941.

APPENDIX

Act of March 4, 1927, c. 509, § 21 (a) (b) (d), 44 Stat. 1424, 1436, as amended (33 U. S. C. § 921 (a) (b) (d)):

> SEC. 21 (a). A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b). If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part,

where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

* * * * *

(d). Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter.

R. S. § 540; March 3, 1911, c. 231, § 91, 36 Stat. 1117, as amended (28 U. S. C. § 171):

91. The State of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri. The eastern district shall include the territory embraced on the 1st day of July 1910 in the city of Saint Louis and the counties of * * *; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the northern division of said district, * * *.

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CHARLES ELMORE CROPLEY

No. 274

IN THE

Supreme Court of the United States

October Term, 1941

—o—

MASSMAN CONSTRUCTION COMPANY.....Petitioner

vs.

HARRY W. BASSETT,
Deputy Commissioner, etc., et al.....Respondents

—o—

On Petition for Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

—o—

PETITIONER'S REPLY BRIEF

—o—

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PETITIONER'S REPLY BRIEF

ARGUMENT

I

The various arguments presented in the brief of respondent, Harry W. Bassett, have, we think, been sufficiently dealt with in our original brief in support of the petition for certiorari. The only exception to this statement is found in the argument on point three of Bassett's brief being contained on pages seven and eight. Under this point Bassett contends that the provisions contained in Section 921-B, Title 33 U. S. Code in regard to the place where an action of this sort must be brought are jurisdictional in the sense that they relate to the subject matter jurisdiction of the action and hence cannot be waived. This

argument is based upon the provisions of the subsequent subparagraph Section 921-D which reads.

> "Proceedings for suspending, setting aside or enforcing a compensation award * * * shall not be instituted otherwise then as provided in this Section and in Section 918 of this Chapter."

Counsel for the respondent interprets this last quoted paragraph as meaning (a) that such an action shall not be brought at a place or at a time other than the place and the time indicated in Sections 918—921-B and, (b) that no court shall have jurisdiction to hear and determine an action unless these venue and time requirements have all been met.

II

Note particularly that Section 921-D does not say all of these things in express words, they must be read into it by interpretation. If this were the only thing that the Section could mean and if it could have been enacted for the purpose of making venue and limitation provisions of the act jurisdictional and for no other purpose the construction contended for would be correct, but it is submitted that if another interpretation is possible it should be accepted and that this is true because, had Congress intended the drastic results which would follow from the interpretation of the law argued for by respondent, it could and would have used more definite and expressive language.

It is submitted that in enacting Section 921-B Congress meant this and only this: An award of a deputy commissioner cannot be set aside, suspended, or modified by a ruling of the whole industrial commission, nor can it be interfered with by the courts through mandamus, certiorari, prohibition, or any other of the ordinary legal processes, nor shall it be vulnerable to a collateral attack.

In the first place it is to be noted that when this law was

adopted most of the States had compensation acts. That in many of these instances an award of a deputy commisioner, arbitrator or referee was subject to review before the whole commission. An examination of the congressional record cited in our principal brief will show that there was considerable argument as to whether such procedure should be provided for in this law and that a decision was definitely made against it by Congress. In the second place in the absence of a provision like Section 921-B it would have been argued that the award of the commission was not a judgment and hence was susceptible to collateral attack in the courts in a large number of different proceedings. Congress, therefore, enacted the Section above quoted for the purpose of saying that only one type of proceeding should be available to review a compensation award, to-wit: the Bill in Equity provided for in the preceding sub-sections and likewise that only one type of proceeding should be available to enforce the compensation award thus precluding the various sorts of suits or enforcement which might otherwise been brought.

An examination of the cases cited in the Basset brief shows that they support the contention we are making rather than that made by the respondent. Three of these cases Pillsbury vs. Alaska Packers Association, 85 Fed. (2d) 758; Associated Indemnity Corporation vs. Marshall, 71 Fed. (2d) 235 and Associated Indemnity Corporation vs. Marshall 71 Fed. (2d) 420 are not in point at all on the facts. They are cases in which claims were filed too late and hence were barred by the limitation provisions of Section 921. They do not involve any discussion of waiver because in each instance a proper motion to dismiss on the ground the statute of limitations had run was duly filed in the lower court. The case of Mille vs. McManigal, 69 Fed. (2d) 644 holds that the action of the commissioner in making an award or refusing to make one cannot be controlled by the court through the writ of mandamus and the case of Swofford vs. International Mercantile, 133 Fed. (2d) 179

holds that the award cannot be attacked in a proceeding to recover back money paid thereunder. Thus the last two of these cases are directly in line in the interpretation of Section 921-D which we have given. Not one of them intimates that Section 921-D is to be interpreted so as to make the venue or limitation provisions of Section 921-B jurisdictional in the sense of prohibiting their waiver by the parties. Such a holding could not have been made on the facts of any of these cases and there is not even any dictum to be found in them supporting the construction of the Section placed upon it by respondent.

III

Finally Section 921-D cannot apply in such a manner as to take away the jurisdiction of the courts to declare void a compensation award where the deputy commissioner making the same acted entirely outside his jurisdiction and authority under the constitution and the act. For example Section 921 makes the finding of facts by a deputy commissioner final and binding on the courts if it is supported by any evidence. In other words under the section such a finding has the force and effect of a jury verdict, but this court has said in Crowell vs. Benson, 285 U. S. 22 that Congress could not thus limit the courts if the question involved was that of the jurisdiction of the deputy commissioner to hear and determine the case. If this is true it necessarily follows that Congress cannot limit the jurisdiction of the courts by imposing mandatory venue provisions where that jurisdiction is being exercised to determine whether or not the deputy commissioner had any power to determine the issues before him at all. This principle is expressly recognized in the very cases cited by respondent and above discussed. Now that is what the petitioner sought to do in this case and the only thing it is seeking to do. The petitioner is asking to have the court determine whether or not respondent Bassett had jurisdiction to determine this claim. Certainly the Federal Courts have an inherent right to prevent a federal

officer from attempting to take jurisdiction over a matter of purely cognizance apart from the provisions of the compensation law itself and that act could not deprive the courts of their power in that regard.

We cannot believe that respondent is wholly sincere in his contention on this matter for he proceeds to argue that the whole question is not of any importance in any event and he bases this proposition upon the alleged fact that the issue has not before been raised. The court can readily see that because if the shifting channel of the Mississippi River and some of the other similar rivers the matter has now become of vital importance. That it will be very difficult to determine in which district review proceedings are to be brought where the accident involved occurred upon such a river as the Mississippi and that in many such cases the question of waiver of the venue provision of the act will become of vital importance. It is, therefore, again submitted that this question ought to be ruled upon by this court after a full hearing. We again refer to the fact that other contentions raised by the respondent in his brief have we think been answered in the original brief of petitioner herein and again respectfully request the issuance of certiorari and the determination of this cause by this court.

Respectfuly submitted,

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